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BEFORE THE SURFACE TRANSPORTATION BOARD

EX PARTE NO. 582 (Sub-No. 1)

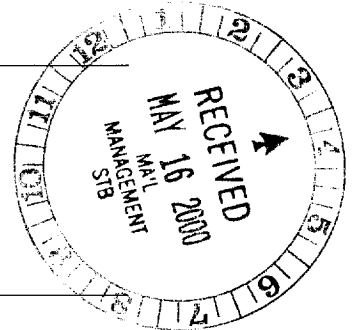
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MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS

By

E. I. DUPONT DE NEMOURS AND COMPANY



In accordance with the Advance Notice of Proposed Rulemaking (ANPR) served on March 31, 2000, these Comments are submitted on behalf of E. I. Du Pont de Nemours and Company ("DuPont"). DuPont appreciates the opportunity to comment in response to the Board's March 17 decision in Ex Parte No. 582, *Public Views on Major Rail Consolidations*, and the ANPR. As mentioned in our March 8 statement in Ex Parte No. 582, the U.S. rail industry is clearly at a crossroads where the future is uncertain, the ground rules must change, and the status quo is no longer acceptable. The ANPR is an historic opportunity to reshape and reinvigorate the future of rail transportation in North America. The Board is wise in recognizing the need to consider new policies that would "enhance, rather than simply preserve competition." DuPont encourages the Board to apply this new competitive thinking in a broad way to all its rulings, and not confine its application to merely the next merger application.

DuPont is a \$26 billion diversified chemical and life sciences corporation with over 200 manufacturing sites and almost 100,000 employees worldwide. Rail transportation is critical to DuPont's domestic and export business, and is for many of our chemi-

cal products the only safe and practical mode of transportation. Each year, DuPont and its affiliates ship in excess of 70,000 rail shipments, representing over \$220 million in railroad freight revenue, in a private fleet of over 9,000 rail cars. More importantly, these shipments are the fundamental basis of DuPont's diverse global supply chains, and directly produce \$5.5 billion of North American sales and exports. 75% of this has no other transportation alternative, either because of safety considerations or sheer volume.

At DuPont, we believe that *safe, reliable, and efficient transportation at a competitive cost is critical to our business success*. Indeed, DuPont's principal core value is safety. With a heritage of nearly 200 years committed to the safe manufacture, transport and distribution of its products, DuPont has long been recognized as a leader in safety, and has received numerous awards from the Class One railroads. Our corporate policy states that DuPont will only manufacture, distribute, and transport materials and product which can be safely handled, transported, stored and used by its employees, distributors, and customers. There is little doubt that rail is one of the safer modes of transportation for shipping hazardous goods. The safety of our goods in transportation is so very important to us that it is not unusual for us to disqualify a carrier from carrying our goods if that carrier's safety performance or rate of safety improvement does not satisfy us. Our reputation, indeed our very license to operate is at stake.

DuPont further believes that a *competitive, privately owned and operated, market-based, and financially sound* transportation industry is the best way to achieve this safe, reliable, and efficient transportation system. Effective competition is a key driver to improved service and quality, as has been proven in countless other industries. A free

marketplace gives customers choices, and the customer may choose with quality, service and safety having equal weight with cost. History has also shown that competition creates a more innovative, profitable and stable marketplace to the benefit of both those providing and those receiving the goods and/or services. Competition has time and time again been demonstrated to be the most effective driving force for continuous improvement.

As we said in our earlier statement, the 1980 Staggers Act has been a great success in allowing railroads to shed excess capacity, improve productivity and safety, establish market pricing, and restore financial health to the industry. But supporters of Staggers did not envision the sheer magnitude of railroad consolidation that was to occur through mergers over the subsequent 20 years, and did not foresee that over 90 % of all U. S. rail traffic would eventually be controlled by only four major territorially dominant railroad systems. This rationalization and concentration of the industry has severely limited, if not altogether removed, competitive choices for most customers.

And from DuPont's perspective, Staggers, in its application, fell short of its potential in at least two other significant ways.

First, it did not improve the competitive balance for most railroad carload customers. Expanded competitive access through terminal and trackage rights or reciprocal switching has proved very difficult to obtain. Many rail customers, commonly referred to as "captive shippers," find themselves isolated and effectively served by only a single rail provider. DuPont itself, despite its size and resources, is captive for 80% of our U. S. rail

traffic. The net result has been that the marketplace for railroad services has never enjoyed the benefits of deregulation. Many “captive” customers have no choice of their rail carrier or service level. Shipper choice and competition among railroads, from a given origin to destination, are almost non-existent.

Second, rail service has continued to be disappointing for most customers, and particularly for carload shippers like DuPont. Promises of service improvement, such as for Interline Service Management, seem ever further away. Today, because of the increased concentration and the regulated framework governing the industry, rail customers cannot disqualify carriers who do not perform. We need the ability to select carriers based on performance and to divert business away from carriers who do not perform.

Now we are faced with either an eventual final round of mergers into a North American rail network dominated by two major transcontinental systems, or a continuation of the current state if these proceedings create barriers that effectively prevent future mergers. This ANPR creates an historic opportunity to complete the work intended by Staggers and set the stage for a future where much-needed real competition, rather than regulation, drives economic success. The question is not whether but when, and – most importantly - what needs to be in place to create an equitable competitive economic environment in which railroads and their customers can both prosper.

The Board has asked commenters to address several specific areas. DuPont will do so as follows, but with the strong belief that such changes must apply broadly to the entire railroad industry rather than any particular merger applicants. Before doing so, a

brief statement regarding the Board's authority to undertake this review and possible revision of its merger policies is in order.

### **The Board's Authority**

The Board is required by the Interstate Transportation Act to approve any major railroad consolidation that it finds to be in the public interest. 49 U.S.C.A. §11324(c). The Board is also authorized to impose conditions on a rail consolidation to ensure that such a consolidation satisfies the [public interest criteria. *Id.* Over the last 20 years, the Board and its predecessor, the Interstate Commerce Commission ("ICC") has narrowly circumscribed the scope of both the public interest elements that it will consider, and the scope of the conditions that it will impose on a proposed consolidation. *Cf.* 49 C.F.R. §1180.1. However, as has occurred in the past, the Board may modify the public interest aspects of a transaction that it will consider in reviewing a transaction and in imposing any conditions.

For example, the ICC has previously modified the policy considerations it will expect the parties to a major rail consolidation to address. *Railroad Consolidation Procedures*, 359 I.C.C. 195 (1978), 363 I.C.C. 241 (1980) and 363 I.C.C. 784 (1981). As the Board made clear in each of those decisions, it obviously retained the authority to determine what is included in the public interest in considering any particular consolidation. Moreover, the parties to any particular proceeding are free to challenge the application of a policy statement in any particular proceeding. *See, e.g.*, 363 I.C.C. at 791.

The Board may also choose to make policy changes by means of rulemaking to adopt a binding norm applicable to any and all rail consolidations. For example, the ICC considered whether to adopt a rule stating that it would no longer apply a set of standard traffic protective conditions known as the “DT&I Conditions.” *Traffic Protective Conditions*, 366 I.C.C. 112 (1982). The Commission ultimately decided not to adopt a rule for future application (choosing instead to enunciate a new policy statement), although it did adopt a rule revoking previously imposed traffic conditions from already-approved consolidations. 366 I.C.C. at 134. A reviewing court eventually held that before rule could be applied to any previously-approved transaction, an individual hearing must be held. Nonetheless, the Court recognized that the agency could choose to adopt a rule, in appropriate proceedings, to govern both future proceedings as well as modifying previously approved transaction. *Detroit, T. & I. R. Co. v. US*, 725 F.2d 47, 51 (6<sup>th</sup> Cir. 1984).

Thus, the Board has considerable flexibility in how it proceeds to implementing the changes in policy it should adopt in this proceeding.

**Downstream Effects:**

The Board is wise to fully consider the downstream effects and possible competitive responses by the other Class One railroads that could follow the next merger approval, and end the "one-case-at-a-time" approach. However, the next merger applicants should not be unduly punished for the problems of other mergers if the combination creates value for their customers. Future mergers should always be conditioned in such a way that overall rail-to-rail competition is increased with a long-term goal of providing every rail customer with a choice of rail carriers. For example, the Chemical Manufac-

turers Association requested such a condition for the BNSF/CN merger proposal, which would allow all railroad customers to choose to do this through (1) reciprocal switching, (2) trackage rights on a competing railroad, (3) BNSF-CN haulage, (4) quotation of a segment rate to an interchange, or (5) any other mutually acceptable means. This condition would seem to be one excellent solution to providing competition and innovation within a future two-railroad system if adopted and applied broadly to all railroads. Another would be to adopt a system similar to that of Canada. Canadian National and Canadian Pacific both seem to thrive safely and financially in such an environment.

#### **Maintaining Safe Operations:**

DuPont strongly agrees that maintaining safety is *the* primary goal in merger implementation. The Safety Integration Plan (SIP) process worked well during the Conrail and Canadian National/Illinois Central transactions and should be continued. However, we are concerned about a railroad's ability to provide an adequate flow of funds for infrastructure maintenance and asset renewal if its merger encounters continuing operating difficulties. Such a situation currently exists in the East. This should be addressed in either the SIP or any future Service Integration Plan (as noted below), and also in oversight.

#### **Safeguarding Rail Service:**

The Board should require a Service Integration Plan, similar in concept to the SIP for Safety, be filed with each future application. Such a plan should include publicly visible pre-merger benchmarks; performance goals, timelines and ongoing metrics that

are based on customer oriented values, such as loaded/empty transit or cycle times for key traffic lanes and on-time performance. The metrics required for the Conrail merger, while extensive and informative, were railroad operational measures and did not include pre-merger benchmarks.

Continuing Board oversight for at least five years should be mandatory because of the significant potential public impact of any future Class One mergers. The oversight process should also incorporate financial performance versus forecasts included in the merger application, with particular attention to cash flow and capital spending to address our earlier concerns about infrastructure and asset maintenance. Oversight might also include appropriate fines or mandate investment if merger commitments are not met.

### **Promoting and Enhancing Competition:**

The Board is wise in recognizing the overdue need to emphasize enhancing rather than simply maintaining competition. DuPont would prefer this new emphasis be directed at the entire railroad system, rather than just specific future merger applicants, to ensure the playing field remains level.

Actions the Board should adopt include:

- Requiring all major gateways to remain open.
- Opening terminal areas to reciprocal switching, at agreed-upon switching fees for any customer within a reasonable distance. The Canadian inter-switching system is an effective and efficient model that does not require proof of "anticompetitive conduct".



- Requiring a railroad to offer, if requested, a contract for the competitive segment of a joint line route where the joint line partner has a bottleneck segment, and in turn require this partner to then provide a new through route.

### **Shortline and Regional Issues:**

Short line safety is a major concern for DuPont. Class One railroads, as they shed short lines to improve cost and productivity, must provide the safety and environmental stewardship to ensure the new entities are viable within their local communities. Safety oversight and ongoing training should be required of all major railroads that spin off small railroads which are essentially captive to them. The entire rail system is only as safe as its weakest link.

In essence, short lines and regional railroads that are solely connected to a single rail line face the same problem as captive rail customers in that they cannot control their own destiny. Paper barriers, established at the time of the short line spin-off as a condition of sale, constrain the economic potential of new short lines and are clearly not in the public interest. These must be eliminated. Further, steel trackage barriers that restrict short line and regional access to a nearby second railroad within a terminal area are equally constraining to their viability.

### **Three-to-Two Issues:**

In general, very few potential three-to-two situations exist in the greatly converged railroad system so in itself this situation is now almost irrelevant. DuPont's major

concern continues to be the large number of our manufacturing sites that are dependent on and captive to a single railroad. Given DuPont's preference for private (rather than governmental) solutions wherever possible, we previously initiated discussions with two Class One's to find a mutually agreeable way they could treat our captive sites from a safety, service and cost standpoint "*as if*" they were served by more than one railroad. These discussions unfortunately were not successful.

### **Cross Border Issues:**

For global companies like DuPont, North American borders must be transparent. Our people and businesses operate fluidly across them every day, and the transportation industry - including railroads - must as well. CN/IC already functions as a seamless cross border entity, while KCS and others own parts of the Mexican railway system. The proposed BNSF/CN merger now only escalates the need to establish a common North American railroad commercial and regulatory framework that supports the potential of NAFTA. We have often referenced in this document the Canadian system as a model that seems to enable railroad success, while providing customers with the service levels they desire. If key elements of this system were extended to the U.S. and possibly Mexico as well, this would clearly create the competitive choices that DuPont and other rail customers need and demand.

DuPont looks to the Board, as the major North American regulatory body, to not only routinely consult with its counterparts in Canada and Mexico on rail issues, but also to take the lead in seeking uniform regulatory processes.

If the Board eventually finds that it does not have all the authority needed to resolve the competitiveness issues that will surely arise under this ANPR, DuPont as in the March 7-11 hearings again suggests the Board seek legislation to expand its authority to create competition. DuPont acknowledges that the Board does not believe it currently has the statutory authority to apply remedies that increase competition where it does not already exist. Thus, DuPont further suggests that the Board identify and request of Congress the specific legislative changes that the Board deems necessary to address this new and changing railroad environment.

While private solutions may not offer an obvious alternative to this ANPR, we continue to encourage the Board to seek opportunities to use its influence to bring railroads and their customers together to dialogue and jointly develop a long-range solution for the industry. This would be consistent with the Board's often-stated preference for private solutions. Such a solution would have to provide expanded competition and value for rail customers, create new market opportunities and growth for railroads, and allow for constructive mergers that bring real value to rail customers.

Safe, reliable and predictable rail transport at a competitive price is essential if DuPont and other domestic manufacturers and producers are to most effectively serve their U.S. and global customer bases. It is our belief that the best way to achieve these goals in the rail industry is through the unleashing, to the maximum extent possible, of competitive market forces. We fully recognize that to achieve this may not be as simple as to just state that it is desirable.

A rail system left to operate with little in-kind competition is not in the best interest of either the customers or the providers - even with government oversight. Therefore, effective competition (or its functional equivalent) must be created. To do any less would be to risk severe economic consequences and accept an unfulfilled great service potential for the country's rail transportation system.

Today's competitive global marketplace requires all elements of a supply chain to work together to produce the highest quality products demanded by the customer at the lowest practical cost. Manufacturers, suppliers, transportation providers and the government must each fulfill their obligations to ensure that this nation's citizens continue to enjoy the highest standard of living of any country in the world. While the specter of competition may be frightening to those who have enjoyed the luxury of not competing, in the end, however, DuPont believes that in-kind competition will ultimately give us a safer and more robust rail industry and a healthier U.S. economy. DuPont, for its part, welcomes the opportunity afforded it by the Board to contribute to this process. We look forward to an on-going role in achieving the proper balance of competition in the rail industry.

In addition, DuPont is familiar with the Comments being filed in this proceeding by The National Industrial Transportation League, by Chemical Manufacturers Association and by the Alliance for Rail Competition, and it generally supports those comments also.

Respectfully submitted,

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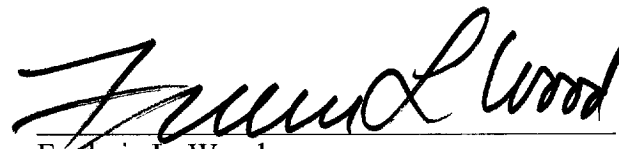
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Dated: May 16, 2000

Certificate of Service

I hereby certify that I have this 16<sup>th</sup> day of May, 2000, served a copy of the foregoing Comments upon all parties of record, via first-class mail, in accordance with the Rules of Practice.

  
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Frederic L. Wood